TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 178 83.

CLIMACO CALDERON, APPELLANT,

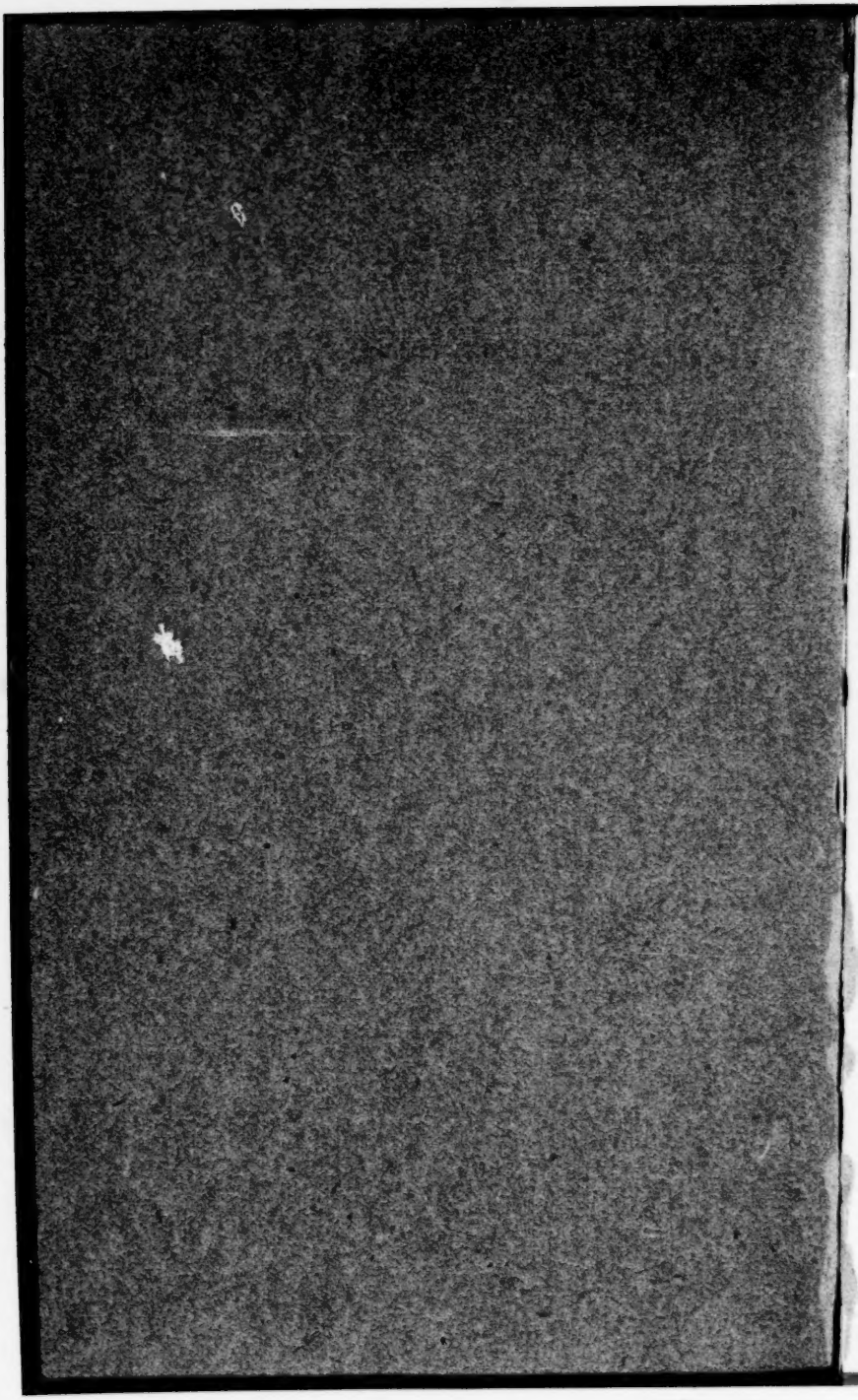
vs.

THE ATLAS STEAMSHIP COMPANY, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED NOVEMBER 30, 1896.
CERTIORARI AND RETURN FILED DECEMBER 30, 1896.

(16,096.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 24, 1897.

1 U. S. District Court, Southern District of New York.

CLIMACO CALDERON, Libellant and Appellant,
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED, Respondent and Appellee.

Statement.

1894.
March 2. Libel filed. No process issued.
May 15. Answer filed.
Nov. 13. Cause tried before Hon. Addison Brown, district judge.
Dec. 3. Opinion rendered awarding libelant $2,900, with interest and costs.
Dec. 31. Final decree entered.
1895.
Jan'y 7. Notice of appeal filed.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of Climaco Calderon, a citizen of the United States of Colombia, commorant, and doing business in the city of New York, in the southern district of New York, against the Atlas Steamship Company, Limited, a corporation organized and existing under the laws of the Kingdom of Great Britain, in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

First. That heretofore and on or about the 19th day of July, in the year one thousand eight hundred and ninety-three, at the city of New York, this libelant delivered to the said Atlas Steamship Company, Limited, twenty-six bales and three crates of duck uniforms consigned to the minister of war, Bogota, in the United States of Colombia, to be transported by the British steamship *Ailsa*, then lying in the port of New York, to Savanilla, and there to be delivered to the Barranquilla Railway and Pier Co. or their agents, for conveyance to Barranquilla, there to be delivered to the collector of customs, for the consideration or freight of thirty-nine dollars and forty-three cents, which this libellant then and there paid to the said The Atlas Steamship Company and received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed marked "A."

Second. That the said steamship *Ailsa* having the goods on board proceeded on her voyage from New York to Savanilla where she arrived in safety, but the said goods and merchandise were not delivered to the agent of the Barranquilla Railway & Pier Co. as agreed, but the said steamship left the said port having the said goods on board and afterwards returned with the same to the port of New York.

3 Third. That the said The Atlas Steamship Company, Limited, did not notify this libellant that the said goods and

merchandise had not been delivered at Savanilla as they should have been, or that the same had been brought back to the port of New York, but without the knowledge of this libellant reshipped said goods and merchandise on board the steamship *Alvo* then bound for Savanilla, which vessel having said goods and merchandise on board afterwards sailed on her intended voyage but never arrived at her port of destination, having been lost on the said voyage with all on board.

Fourth. That by reason of the premises this libellant has sustained damages to the amount of five thousand six hundred dollars.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore this libellant prays that a monition in due form of law according to the course of courts of admiralty, and the rules and practice of this honorable court, in civil causes of admiralty and maritime jurisdiction, may issue against the said Atlas Steamship Company, Limited, and that it may be required to appear and answer on oath this libel and all and singular the matters aforesaid, and if it cannot be found, that its goods and chattels, and if none be found, that its credits and effects in the hands of Pim, Forwood & Co., its agents in the city of New York (being money or claims against third parties in their hands as such agents or due from them, or otherwise), garnishees, may be attached to the amount sued for and costs, and that this honorable court will be pleased to pronounce for the claim of this libellant with costs and
4 interest, and that he may have such other and further relief as in law and justice he may be entitled to receive.

CLIMACO CALDERON.

Subscribed and sworn to before me this 28th day of February, 1894.

SIXT CARL KAPFF,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in N. Y Co.

NORTH, WARD & WAGSTAFF,
Libellant's Proctors.
J. LANGDON WARD, *Advocate.*

(Endorsed:) Libel. Filed March 2nd, 1894.

Atlas Steamship Co. (Limited).

And Barranquilla Railway & Pier Co. (Limited).

Through Bill of Lading from New York to Barranquilla via Savanilla.

Pim, Forwood & Co., agents, 24 State street, New York.

Received, in apparent good order and condition by the Atlas Steamship Company, Lim'd, from Climaco Calderon :

Marks.	Nos.	Packages.
Ministerio De.....	1/26,	26 bales duck uniforms.
Guerra Bogota.....	27/9,	3 crates " "
Total.....	29	Freight, $39.43. Packages mdse.

to be transported by the good British steamship *Ailsa*, now lying in the port of New York and bound for Puerto Colombia (Savanilla), or so near thereto as she may safely get with liberty to call at any other port or ports, in any order of rotation, within latitudes 43° 10′ and 6° 30′ N., and longitude 30° and 100° W., whether in or out of the customary or advertised route, without same being deemed a deviation, whatever may be the reason for calling or entering such port or ports, being marked and numbered as above (weight, quality, contents and value unknown), there to be delivered to the Barranquilla Railway & Pier Co., or their agents, for conveyance to Barranquilla, and to be delivered in like good order and condition, and subject throughout the entire transit and while the goods are in the custody of the carrier to the terms and conditions stated in this bill of lading, which constitutes the contract between the shippers, the Barranquilla Railway & Pier Company, and the Atlas Steamship Company, at the port of Barranquilla, unto Admer Aduacia or to his or their assigns, freight on the said goods to be paid by the shippers, on signing of this bill of lading, at the rates stipulated above, with other charges, if any (and is not to be refunded), vessel or goods lost or not lost. General average payable according to York-Antwerp rules of 1890. All liability of every kind of the Atlas Steamship Company shall cease on delivery of the goods to the Barranquilla Railway & Pier Company.

In accepting this bill of lading the shipper(s) agree(s) that all questions arising under the same shall be construed according to the laws of Great Britain as administered in Great Britain.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the master or agent of the said ship
6 hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.
Dated in New York, this 19 day of July, 1893.

H. WIENER,
For Agent, Severally but not Jointly.

(Endorsed.)

It is mutually agreed that the ship shall have liberty to sail with or without pilots; to carry goods of all kinds, dangerous or otherwise; to tow and assist vessels in all situations; to proceed to the ultimate port of destination via any other port or ports in any order or rotation, whether in or out of the customary or advertised route, and whether such port is in the ordinary course of the voyage beyond the port of the destination of the goods or not, whatever may be the reason for calling at or entering such port or ports, and to deviate for all or any of the above purposes, and with liberty, in the event of the steamer putting back to port of sailing, or into any port, or being otherwise prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail, or in tow of any other vessel, or in any other manner which the ship-owner shall think fit, and to ship or tranship the goods by any other vessel, and with liberty also before shipment, or at any period of the voyage, and so often as may be deemed expedient, or at any port or place to ship the whole or part of the goods by any other steamer, or to tranship or land and store and put into hulk or craft for such time as may be deemed expedient, and thence reship by lighter or otherwise the goods, and to forward them by any other conveyance to the port of destination, extra compensation to be paid for such service; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by a vessel or vessels of the carrier for the time being, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond its control, by
7 the perils of the sea, or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor

for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipment; nor for damage of any kind resulting from fumigation or any other action of sanitary authorities in consequence of quarantine or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

8 3. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case of quarantine, the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch, or should this be impracticable, or the ship not be admitted, the master may proceed on his voyage and land the goods at the nearest safe port (in his opinion) at the risk and expense of the owners of the goods, or retain them on board till ship returns. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the owners of the goods, or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore.

5. Also, the master of the vessel has the option of hiring lighters at the port of destination for the landing of the within goods, at the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles, where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in warehouse, on the company's wharf, or sent to the public store, as the authorities at the port of discharge shall direct, and when deposited in the warehouse to be subject to storage and other charges as customary. If by reason of the want or impossibility of obtaining lighters, in the master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board, and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the company shall not be responsible for damage or loss as the consequence thereof.

6. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the invoice cost of goods when shipped, and the carrier has the option of replacing the goods at his expense. Notice of any claim arising under this bill of lading must be given by the consignee to the company's agent at the port of destination within 48 hours after the landing of or failure to deliver the goods.

9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise.

10. Also, in case the surf or state of the weather upon the arrival of the steamer shall be such as to render it, in the master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another steamer at the risk and expense of the owner or consignee of the goods.

11. Also, that the company may land said packages, or any of them, at any intermediate port. In such case it will either place them upon the wharf used by the company, or store them. If placed upon the wharf, all the conditions and agreements of this bill of lading shall be in force while they remain there. If stored, the liability of this company shall cease altogether during said storage. The place of storage does not belong to the company and is not managed by it. When this company shall have delivered said packages or any of them to any other carrier to be transported to their destination, its liability shall cease altogether. This agreement is made with reference and subject to the provisions of the United States Revised Statutes, sections 4281 to 4287, limiting the liability of ship-owners, and to the rules of the United States Supreme Court, made in pursuance thereof.

12. Also, in case of the blockade or interdict of the port of destination, or if without such interdict, the entering of the port of discharge should be considered unsafe, by reason of war or disturbances, the master to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in the warehouse, and a letter being put into the post-office addressed to the shipper and consignee, if named, stating the landing, and where deposited, the goods to be at the shipper's and consignee's risk and expense, and the company to be discharged from all responsibility.

13. Also, any duty, tax, or impost, of whatever nature, levied upon the steamer by the authorities at the port of discharge, for or

in connection with the goods herein described, to be paid by the consignees of the goods before delivery.

14. This agreement is made with reference to, and subject to, the provisions of the U. S. carriers' act, approved February 13th, 1893.

PIM, FORWOOD & CO., *Ag'ts.*

11 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of the Atlas Steamship Company, Limited, to the libel of Climaco Calderon, in a cause of contract, civil and maritime.

First. Admits the allegations of the first, second and third articles thereof.

Second. Denies any knowledge or information sufficient to form a belief as to whether libellant has sustained damage to the amount of $5,600, or any damage, and leaves him to his proof respecting the same.

Third. Denies that all and singular the premises are true, but admits they are within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Fourth. And further answering herein, respondent alleges, that as libellant well knew the steamer *Ailsa* and the other steamers run and managed by this respondent in the course of their regular voyages touch at many different ports, and that it is often impracticable to deliver at each port in regular order the parcels or packages consigned to that port; that in and by the bill of lading annexed to the libel herein it was agreed between this libellant and the respondent that in the event of the officers of said ship being unable to find the whole or a portion of said goods during the vessel's stay at the port of destination, the carrier should be at liberty to forward the goods at the first opportunity, when found, at the carrier's expense, the vessel not to be held liable for any claim for delay or otherwise.

Fifth. Upon the arrival of said *Ailsa* at the port of Savanilla the officers in charge were unable to find said cargo, and were
12 unable to find the same until shortly before said steamer's arrival at New York, whereupon and within twenty-four hours after said steamer's arrival the same was forwarded as agreed by the steamship *Alvo*, being the first steamer sailing for Savanilla by which said goods could be forwarded.

Sixth. That the said loss was occasioned solely by a peril of the sea, and was in nowise occasioned or contributed to by the negligence of this respondent or its agents or servants.

Seventh. And further answering respondent alleges that in and by said bills of lading referred to, it was mutually agreed in the event of any loss whatsoever this respondent should not be liable for goods of any description above the value of one hundred dollars a package, unless bills of lading were signed therefor, with the value therein expressed, and a special agreement made. That no value was stated in the bills of lading herein, and no special agree-

ment was made with reference to the value of said goods; that the number of packages alleged by libellant to have been lost was twenty-nine; that this respondent prays that in the event that this honorable court would be pleased to decree that the loss complained of was occasioned by its negligence, that proof of value of said goods shall not be received beyond the sum of one hundred dollars a package.

Wherefore respondent prays that this honorable court would be pleased to dismiss the libel herein with costs.

WHEELER & CORTIS,
Proctors for Respondent, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Grey Kellock, being duly sworn, deposes and says: That he is the duly authorized attorney-in-fact in the city of New York of the defendant in the above-entitled action, and that the
13 foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by said defendant is that it is a foreign corporation, and not within said city and county, and capable of making this affidavit; and that the sources of deponent's knowledge and the grounds of his belief respecting the allegations of said answer are derived from his relations to the said defendant as such attorney as aforesaid, and from conduct of, and familiarity with, its business and affairs in said city.

H. G. KELLOCK.

Subscribed and sworn to this 15th day of May, 1894, before me—
[SEAL.] JAS. MOORE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) Answer. Filed May 15th, 1894.

14 United States District Court, Southern District of New York.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED.
} Before Hon. Addison Brown, Judge.

NEW YORK, *November* 13, 1894.

Appearances:

Messrs. North, Ward & Wagstaff (Mr. Ward) for the libellant.
Messrs. Wheeler & Cortis (Mr. Wheeler) for the respondent.

The claims of the libel and answer are stated.

Mr. Ward offers in evidence the bill of lading which is marked Ex. 1 of this date.

Libellant rests.

15 Depositions of John W. Morris and John J. Monks, for the respondent, read in evidence.

United States District Court, Southern District of New York.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED.

NEW YORK, *November 2d*, 1894.

Present: Mr. Ward, for libellant; Mr. Cortis, for respondent.

JOHN W. MORRIS, being duly sworn and examined as a witness for the respondent, testified:

By Mr. CORTIS:

Q. You are the captain of the steamship *Ailsa*, belonging to the Atlas Steamship Company?

A. Yes.

Q. How long have you been captain of the *Ailsa?*

A. Six years.

Q. Were you the captain of the *Ailsa* on the voyage from New York beginning in July, 1893?

A. Yes.

Q. For what ports was the *Ailsa* bound?

A. We went to Kingston, Savanilla, Carthagena and Limon.

Q. And from Port Limon?

A. New York.

Q. Did you stop at all of those ports that you have mentioned?

A. Yes.

Q. Was it reported to you at any time during that voyage that a portion of the cargo which was on the ship's manifest to be delivered at a designated port had not been delivered at that port?

A. Yes.

Q. For what port was the cargo destined?

A. It was shipped to Savanilla.

Q. Do you recollect what the cargo was?

16 A. I couldn't tell you what was in it; I only know that it was some cases.

Q. How many cases?

A. I don't remember how many.

Q. When and where was that reported to you and by whom?

A. At Carthagena, by the purser.

Q. Had the ship left Savanilla at the time this was reported to you?

A. Yes.

Q. Did the purser report to you whether or no the cargo had subsequently been found?

Objected to as immaterial.

Q. Did the purser report to you that this parcel was on board at the time he made the report?

A. When he made the report he reported to me that we had some cargo that ought to have been landed at Savanilla.

Q. Did he state any reason why that cargo had not been landed at Savanilla?

Objected to as immaterial.

A. Yes.

Q. What reason did he state?

Objected to as incompetent.

A. That it was stowed amongst the Carthagena cargo.

Q. What orders, if any, did you give as to the delivery of the cargo after this report?

Same objection.

A. I consulted with him as to what was the best thing to be done, and we came to the conclusion that the best way to get it delivered was to take it back to New York and ship it in the next ship going south.

Q. Did you ship it at New York?

A. We did.

Q. Why did you not deliver it at Carthagena?

A. Because I believe the law does not allow us to land any cargo that is not on the manifest, and also because there is very
17 little communication with Carthagena from Savanilla by sea; there is communication by the river steamers, and at that time, to the best of my recollection, the river steamers were not running because the Dickie was dry and the steamers couldn't run.

Q. How much delay would it have caused your ship if you had returned when you discovered the cargo was on board and delivered it at Savanilla?

A. We couldn't have returned until we had discharged our cargo at Carthagena, and then it would have taken us at least a day to have gone back to Savanilla.

Q. What was the nature of the cargo remaining on board after discharging at Carthagena?

A. The cargo remaining on board then was homeward cargo, consisting of coffee, hides, etc., but we were timed to be at Limon at a certain day to take up a perishable cargo that was waiting, and that was one reason why we couldn't go back to Savanilla.

Q. What was done with the cargo, the cases you have referred to as having been shipped to Savanilla, when the ship returned to New York, if you know?

A. To the best of my belief it was taken on by the first ship going to Savanilla, transhipped.

Q. Do you know the name of the ship to which it was transferred?

A. I think it was the *Alvo;* she was the ship going out as we came in to New York at that time.

Q. What time did you arrive at your dock?

A. We arrived at the dock about ten o'clock in the morning.

Q. Do you recollect how soon after the *Alvo* sailed?
A. About three o'clock that afternoon.

Cross-examined by Mr. WARD:

Q. Have you a regular sailing time of day?
A. Yes.
Q. What time?
A. Twelve o'clock, or as soon after as the ship is ready.
Q. Do you remember what time you sailed on this voyage?
A. We sailed?
Q. Yes.
A. I don't recollect. I think it must have been about two or three o'clock.

18 JOHN J. MONKS, being duly sworn and examined as a witness for the respondent, testified:

By Mr. CORTIS:

Q. Mr. Monks, you are the purser of the steamship *Ailsa*, belonging to the Atlas Steamship Company, Limited?
A. I am.
Q. How long have you been purser?
A. About four years more or less.
Q. Were you the purser on the *Ailsa* in July, 1893, on a voyage from New York?
A. I was.
Q. Was it any part of your duty to supervise the discharging of the cargo in the various ports at which the *Ailsa* stopped after leaving New York?
A. It was and it is.
Q. Was there any cargo on board on that voyage which was not delivered at the port to which it was consigned?
A. There was.
Q. State in your own way the nature of the cargo and the port to which it was consigned.
A. There was a lot of packages, cases and bales—a lot of 29, numbered, I think, from 1 to 29—if I recollect correctly. The contents, I am given to understand, were uniforms—Government uniforms—destined for Savanilla.
Q. Do you know the reason why that cargo was not delivered at Savanilla?
A. For the reason that it was found after leaving Savanilla mixed in among the Carthagena cargo at Carthagena.
Q. When and how did you first discover that there was a short delivery at Savanilla?
A. After leaving there and going through the cargo books, which is my custom, I found this lot of goods—that not even a single package had been tallied out.
Q. Was this a part, or the whole of the consignment?
A. The whole of that particular lot. There were two lots, I think;

the complete shipment was 42 or 43 packages, but this was a single lot of 29 packages; part of the shipment.

Q. In what hold of the ship was the Savanilla cargo stowed?

A. Nos. 4 and 5.

19 Q. Was any other cargo stowed in those holds?

A. And 3, if I recollect.

Q. Was any other cargo stowed in those holds?

A. There was.

Q. Did you become aware while the vessel was at Savanilla that this cargo was not delivered?

A. No, sir.

Q. When did you first become aware of it, how long after leaving Savanilla?

A. That same afternoon, I think, if I recollect rightly, we left there at 12 o'clock, and it must have been an hour, or two hours, previous to arrival at Carthagena.

Q. When was that cargo discovered?

A. It was discovered within an hour of the discharge of the Carthagena cargo.

Q. An hour before or after?

A. Before.

Q. Where was it?

A. It was in No. 3 hatch where the Carthagena cargo was stowed, mixed with it in the last tier.

Q. What did you do upon discovering this cargo?

A. I reported at once to the captain.

Cross-examined by Mr. WARD:

Q. When you say the last tier, what do you mean—do you mean the last of the cargo that is put into the ship?

A. No, the first that is put in the ship and the last to come out.

Q. Did you see it there?

A. I saw it there; the moment it was reported to me I went down and saw it, and I came up and reported to the captain; it was reported to me by the third officer, who checks out that cargo; my place is in the after hold, his place is in the forward hold. I came down and saw that it was the cargo consigned to Savanilla.

Q. How long was that after leaving Savanilla?

—. ——.

Q. About 24 hours' run?

A. No, it was not that; you see it takes—the distance is 76 miles—we got there that evening, and we didn't commence to discharge cargo until the next morning, and it was the morning after that.

20 Q. Do you have anything to do with the loading of the ship?

A. Nothing whatever, sir.

Q. You don't have anything to do with checking the goods as they come in?

A. No, sir.

Q. Who does?
A. It is done at New York, on the dock.
Q. So that you don't know whether the goods are on board the ship or not?
A. We don't know what is in the ship until the goods are discharged.
Q. Haven't you a book on board?
A. Yes.
Q. You have copies of bills of lading?
A. We have the ship's copies of bills of lading.
Q. That is what you meant when you said you looked over the cargo book?
A. As made out by me from the bills of lading; those cargo books are used to check the cargo out, which is the only guarantee that the company has that the cargo has left the ship.
Q. In checking out cargo do you have your book arranged by ports?
A. We have books for every port; there are four books made out for every port.
Q. Delivery books?
A. Or check books.
Q. So on each book would appear the cargo for each port?
A. Yes, sir.

J. H. THOMPSON, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. WHEELER:

Q. What is your business?
A. I am the correspondent and claim clerk of the Atlas line.
Q. How long have you been in their employ?
A. Fourteen years nearly; fourteen years since I first joined the company in Liverpool.
Q. Have you during that time been acquainted with their steamers and the various routes they have taken?
A. Yes, sir, for eight years.
Q. Do you know this route from New York to Savanilla and Carthagena and Port Limon?
A. Yes, sir.
Q. How long have your vessels been running on that
21 route?
A. The schedule varies at different times; I don't know exactly how long that particular route was running.
Q. Several years?
A. Yes; they are changed now and again, according to circumstances; as the trade demands.
Q. As I understand you, your steamers have various routes, they don't all go on this route to Carthagena and Savanilla?
A. No.
Q. What I want to get at is whether you have been running steamers on that route for several years?

A. From what I remember I think that that particular schedule was running for about three years.

Q. On that route do you carry anything besides cargo?

A. Passengers, specie and mails.

Q. Is the usual course of that route, as described by the captain, first to Kingston, then to Savanilla, then to Carthagena and Port Limon and then back to New York direct?

A. Yes.

Q. Do you know the libellant, Climaco Calderon?

A. Yes.

Q. What is his position in New York?

A. Consul general of the Republic of Colombia.

Q. How long has he been the consul general?

A. Three years or four years, or more.

Q. During that time state whether he has been in the habit of shipping goods by your line to Savanilla.

A. Yes, he has made some shipments.

Q. In making those shipments during this period of three or four years, has the same form of bills of lading been delivered to him that is in evidence in this case?

A. Yes, he must have had his shipments signed on that form on several occasions.

Q. State whether or not, during that time, that has been the form in use on the line, for shipments on that route.

A. Yes.

By the COURT:

Q. How many times can you say he has shipped goods under similar bills of lading?

22 A. I should say ten times probably, at least; that is a point that I couldn't answer exactly.

Q. There have been several?

A. Yes, sir.

By Mr. WHEELER:

Q. Was any special agreement made between him and the company as to the value of these cases of uniforms which were shipped on the *Ailsa?*

A. Not to my knowledge.

Q. It would have been part of your business to know of it if it had been made?

A. Not at the time it was made; but it would have come under my notice afterwards.

Q. When did you first learn that these goods that were shipped had been returned?

A. On the morning of the *Ailsa's* arrival.

Q. What did the company do with them?

A. Transhipped them at once to the *Alvo*, which was loading on the other side of the dock and sailing the same day.

Q. Do you remember the date?

A. It was the 16th of August, 1893.

Q. Was the *Alvo* ever heard from after she sailed with those goods on board?

A. There was a report made by the captain of the brig or schooner by the name of *James Holden;* he saw her on the morning of the 20th of August; then she was in the hurricane, which was coming on with great force.

By the COURT:

Q. She was seen at the time of the hurricane?
A. I believe the ship was already in it at the time.
Q. She was reported as seen August 20th in the hurricane?
A. I am not perfectly certain; but I think it was.

By Mr. WHEELER:

Q. Was she ever heard from after that?
A. Never to my knowledge.

By the COURT:

Q. Where was she when reported?
A. I don't know the exact distance; probably 800 or 900 miles south of New York.

23 By Mr. WHEELER:

Q. What port did she sail for?
A. For Gonaives in Hayti; the first port was —— island to take on laborers, and from there to Gonaives in Hayti.
Q. And from there to Savanilla?
A. There has been a little mistake in the vessel. She didn't go to Kingston this voyage; I mean previously, I think there was a mistake you know in saying Kingston instead of saying these ports in Hayti.
Q. So that the usual route on this Savanilla and Carthagena route was for Hayti ports?
A. At that time it was; now we go via Kingston; I was mixed up.
Q. Then when she sailed from New York on the 16th you said that she was first to touch at Gonaives, then to a port in Hayti, and was she bound from there for Savanilla and Carthagena?
A. After calling at one or more other ports in Hayti.
Q. And at Savanilla she was to deliver these cases of goods?
A. Exactly.
Q. Was there any wreckage or boat picked up——

The libellant admits that the *Alvo* was lost at sea at that time before she arrived at Savanilla and in this hurricane.

Cross-examined by Mr. WARD:

Q. Do you remember what time of day the *Ailsa* sailed in July?
A. I don't remember the exact time.

WILLIAM LONG, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. WHEELER:

Q. What is your profession?
A. Captain of an Atlas steamer.
Q. How long have you been a sea captain?
A. Six months.
Q. How long have you followed the sea?
A. Fourteen years altogether.
24 Q. Have you ever sailed on these two steamers that have been mentioned in this case?
A. On both of them.
Q. How long before the *Ailsa* was lost; that is to say, in August, 1893, had you seen her?
A. Perhaps three or four months.
Q. How large a vessel was she?
A. About 2,000 tons as near as I know.
Q. What was her general condition as to seaworthiness when you saw her last?
A. Very good as far as I could see.
Q. Have you sailed in Atlas steamers in this route from New York to Savanilla, and Cartagena, and back to New York?
A. Yes, sir.
Q. So you know the route?
A. Oh, yes, very well.
Q. Do you know the harbor of Savanilla?
A. Yes, sir.
Q. Did you know it in July, 1893?
A. I was there in either April or May, I don't know which.
Q. What was the customary way during 1893 and previous years, of delivering cargo from the Atlas steamers at the port of Savanilla?

Objected to as immaterial; objection overruled.

A. Into lighters that were towed alongside the ship; the ship was at anchor about a mile and a half from the place where the lighter was taken to.
Q. What facilities were there other than those you have mentioned at that time for delivering cargo at that port?
A. No others at all.
Q. What sort of a harbor was it as to being exposed to the weather?
A. Very rough water there sometimes.
Q. What wind?
A. To the southwest; but a very heavy swell came in there and ships had to get out in a hurry.
Q. Would it have been practicable for the *Ailsa*, on her voyage in 1893, to have unloaded all her cargo into lighters in order to find her missing goods?

Objected to. Objection overruled.

25 A. No, sir.

By the COURT:

Q. Why not?
A. Because there is only a few lighters there and you load the lighters as quick as you can and they are towed to shore and anchored there to give time for the unloading of the lighters onto the old wharf that is there, and sometimes you have—you wait a whole day before you can get an empty lighter; in fact they wouldn't have lighters enough to hold all the cargoes.
Q. What are the customary return cargoes on your steamers on that route in the summer time?
A. Coal, hides, rubber and balsam.
Q. Any fruit?
A. No fruit from that port.
Q. But from the other ports?
A. Yes; from Limon.
Q. Fruit would be perishable?
A. Very perishable.

By Mr. WHEELER:

Q. What kind of fruit?
A. Bananas.
Q. Do you have regular sailing days on which you are advertised to sail from different ports on that route?
A. Yes, sir.
Q. State whether or not, from the character of the trade, it is important to be punctual in those sailings?
A. Yes, very much so, because of the fruit.
Q. Because of the fruit? You mean because the fruit might be decayed?
A. Yes, sir.

Cross-examined by Mr. WARD:

Q. When were you at Savanilla last?
A. About three months ago.
Q. Did you discharge your cargo into lighters then?
A. No, sir; at a wharf.
Q. There is a wharf now built there?
A. Yes, sir.
Q. Have you been to Savanilla between April, 1893, and this time that you mention?
A. Yes, sir; two or three times.

By the COURT:

Q. How much draft of water have they at that wharf?
A. About 23 feet, I think.
26 Q. How far out does it run?
A. I believe the wharf is 4,000 feet long.

By Mr. WARD:

Q. Steamers of your line now discharge at the wharf?
A. Yes, sir.

Q. When do you say that you were there next after April, 1893?
A. November or December; I am not sure.
Q. What ship were you on then?
A. The *Ailsa*.
Q. Did you discharge at the wharf then?
A. Yes, sir.
Q. When you were there in April, 1893, was the wharf in process of construction?
A. Yes, sir.
Q. Are you able to say that it was not completed so that vessels could land their cargo there in July, 1893?
A. No, sir.
Q. You are not able to say?
A. No sir, I was in England.
Q. So you don't know; you are not able to testify now that the *Ailsa* might have landed her cargo from lighters in July or August, 1893?
A. No, sir.
Q. How long is the voyage from here to Savanilla?
A. About 18 days.
Q. So that a vessel leaving here on the 13th of July would normally get to Savanilla about the last day of July or the first day of August?
A. Yes, sir.
Q. You say you are now master of one of the vessels of the Atlas Steamship Company?
A. Yes, sir.
Q. It is the custom to have a manifest of the cargo, is it not?
A. Yes, sir.
Q. You have to have a manifest of your cargo before you can clear?
A. Yes, sir.
Q. And after the cargo is on board and the manifest is made out you go to the custom-house, or somebody does, and gets a clearance?
A. Yes, sir.
Q. The master usually goes himself?
A. Yes, sir.
Q. How long are steamers in port usually here?
A. Seven days or eight days.
Q. And about half of that time is used up in loading?
A. Yes, sir.
27 Q. And cargo is loaded in the order in which it is received?
A. I don't know, sir.
Q. Do you usually take cargo on board the last day of sailing?
A. Yes, sir; I have seen cargo go on board in the morning.
Q. Would that cargo be down at the bottom of the ship in loading?
A. It all depends on how much is in the ship.
Q. But I mean cargo that is taken on board on the day that you sail, would that be naturally and normally down in the bottom of the ship?

A. Oh, no.
Q. That would be on top?
A. Yes, sir.
Q. Are you familiar with the construction of the *Ailsa?*
A. Yes, sir.
Q. You sailed on her at one time?
A. Yes, sir.
Q. Mr. Monks speaks of Nos. 3, 4 and 5 holds; explain what is No. 3, what No. 4 and what No. 5 hold?
A. The engines on the *Ailsa* are in the centre of the ship, No. 1, No. 2 and No. 3 are on the fore part of the engines, No. 4 and No. 5 are on the after part of the engines.

By the COURT:

Q. No. 3 is next the engine bulkhead?
A. Yes, sir.

By Mr. WARD:

Q. How many decks has she?
A. Two cargo decks.
Q. When you speak of the forward hold, it runs fore and aft from the engine bulkhead?
A. No, there is a bulkhead between; either one or two, I forget which.
Q. Are there two decks in each hold?
A. Yes, sir.
Q. Can you give me the size of No. 3 hold, about how big it is?
A. No, sir; I couldn't say.
Q. No. 3 hold is entered from No. 3 hatch?
A. Yes, sir.
Q. And where is No. 3 hatch with reference to the bulkhead; that is, what is the distance from No. 3 hatch to the forward bulkhead of the engine-room?
A. Perhaps 25 or 30 feet.

28 Redirect examination by Mr. WHEELER:

Q. What is the beam of the *Ailsa?*
A. I don't know exactly.
Q. Well, about?
A. About 35 feet, I think.
Q. And about how long fore and aft was this No. 3 hold?
A. Perhaps 40 feet.
Q. So there would be a space in each of the cargo decks of 40 by 30?
A. Yes, sir.

WILLIAM CARTER, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. WHEELER:

Q. What is your business?
A. Stevedore.

Q. How long have you been in that business?
A. Thirty years.
Q. Where?
A. New York.
Q. Did you load the steamship *Ailsa* in July, 1893?
A. Yes, sir.
Q. Do you remember whether or not at the time she sailed the hold in which the Savanilla freight was stowed was filled?
A. These hatches were full.
Q. How about the Cartagena hold?
A. The Cartagena hold was the same manner.
Q. Was your attention drawn afterwards to the fact that there were 29 bales or crates that were to have been delivered at Savanilla, and, in fact, had got in with the Cartagena freight?
A. After the ship arrived back.
Q. Did you make any investigation into that?
A. I did, as far as my foreman is concerned; he said that he went down there but they weren't aware that they put them with the Cartagena cargo.
Q. Can you tell at what time those goods were delivered at the pier.
A. I couldn't say.
Q. Can you tell how long they were delivered before the vessel sailed?
A. Really I couldn't say; they were received on the wharf and piled up and they took them up according to their rotation of the course the ship goes.
29 Q. But I understood you to say that you do remember that when the ship sailed the holds containing the ~~fruit~~ cargo for Savanilla were full?
A. Yes, sir.

Cross-examined by Mr. WARD:

Q You don't mean to be understood as saying that all the Savanilla cargo was stowed in one hold, do you?
A. No, sir.
Q. The purser has testified that the Savanilla cargo was stowed in Nos. 3, 4 and 5 holds; do you know about that?
A. Yes, sir.

By Mr. WHEELER:

Q. In my question to you on direct examination I asked you if when the ship sailed the hold in which the Savanilla cargo was stowed was full, and you said yes. I should have asked you if the holds in which the cargo was stowed were full; do you make the same answer as to the holds that you did when I asked you before in the singular form?
A. Yes, sir; but not filled with all Savanilla cargo.
Q. Can you tell which of them were filled with Savanilla cargo, if any?

A. Not one of them to my knowledge.

Q. Do I understand you to say that in stowing the ship there was cargo for other places than Savanilla that was put in the same holds with the Savanilla cargo?

A. Yes, sir.

Q. What was the reason of that?

A. We have to do that to equalize the trim of the ship from port to port.

By Mr. WARD:

Q. It is almost invariable?

A. Yes, sir.

Q. Tell me about how much time you ordinarily consume in loading these vessels.

A. From 15 to 20 hours.

Q. What proportion of the cargo is ordinarily put on board on the sailing day?

A. We put principally the first ports, but sometimes we get little short shipments of goods that can't be found in transit, and those we put aboard last.

Q. As a rule the cargo for the first ports is put on board the last day?

A. Oh, yes; we take cargo for other ports the last day.

Q. What proportion of the ship's cargo would be usually taken on the sailing day?

A. General cargo, all grades of goods.

Q. Half or two-thirds?

A. Probably 500 barrels, or 200, or 1,000 barrels sometimes. Sometimes we have a quantity of fish that comes there that amounts to 2,500 barrels in some places, and that don't arrive until the morning of sailing.

Q. Do you remember the ship *Ailsa* when she sailed the 13th day of July how much cargo you put on board the last day?

A. That I couldn't answer.

Q. Do you know whether the ship had been practically loaded before the last day or not?

A. She was practically I guess before the last day.

Q. Do you remember about No. 3 hold, whether it would be natural for cargo to be found up against the bulkhead in No. 3 hold that came down to the ship an hour or two before she sailed?

A. Very likely, we would fill up the hatch.

Q. Fill up the whole hold?

A. Yes, sir.

Q. Within two or three hours of the ship's sailing?

A. Yes, sir.

Q. Fill up the whole hold?

A. Oh, not the whole hold.

By Mr. WARD:

Q. That couldn't happen with cargo that came down just before the sailing, could it?

A. It may probably happen; we have several ports to put in the morning of sailing.

By the COURT:

Q. Is it probable that there would be cargo put in at the bottom of the hold on the morning of sailing?

A. We have the hold open, we have to reserve places for what we call wet goods, pickled fish and pickled pork, &c.

31 Q. Do you usually have the entire hold empty in No. 3 up to the morning of sailing?

A. Oh, no, sir.

Q. I understand the purser to say that this was found in the lower tier in No. 3 hold, and I want to know if it was a common thing that No. 3 hold would be open and untirely unfilled, so that on the morning of the day of sailing the cargo could be put in?

A. Yes, sir, the cargo could be put in there the morning of sailing.

Q. Is it a common thing that that hold would be entirely empty?

A. If we are notified that we have such kinds of goods coming we fill around the hatches and keep a place for the goods in question.

Q. About dry goods; now would those goods be likely to be stowed in the bottom of tier No. 3 hold if they were received on the last day of sailing?

A. It might be possible that those goods were put in there, we have got all grades of goods in the lower holds of those ships.

By Mr. WARD:

Q. What I want to get at is this: In loading the ship you put in ordinary—the first cargo that you put in down at the bottom of the ship, unless you have special notice that some particular kinds of wet and heavy goods are coming and you are to reserve a place for them, in that case you reserve a place and fill up the hatches?

A. Yes, sir.

Q. Now, the ordinary way of loading the ship is to take the cargo as it comes, putting the heavy and wet cargo in the lower hold and building up so as to distribute your weight properly, and when you get up to the first deck, then as the goods come in, being dry goods, you set those up against the bulkheads; what I want to know is whether under ordinary circumstances the No. 3 hold would be so empty on the morning of the day of sailing that light goods coming down on that day would be stowed in the lower tier in that hold, way up against the bulkhead in the back part of the ship?

A. It could be.

Q. But would it be normally?

A. Yes, sir.

32 Q. You usually do it?

A. Yes, sir.

Q. Ordinarily goods coming down on the last day before the ship sails are put down at the bottom of the ship?

A. We reserve a place for all grades of packages.
Q. Do you reserve it when you haven't got any notice?
A. We have them as a rule on the pier.
Q. And then you take them out on the pier?
A. Yes, sir.
Q. How can you do that if they don't get there till two or three hours before the ship sails?
A. We take them when they do come, it is a question for what ports they are designated.
Q. And you wouldn't stow Savanilla goods in the lower tier of the lower hold?
A. Yes, sir.
Q. Is that the ordinary way of stowing them?
A. Oh, yes.
Q. Any difficulty in getting them when you get there?
A. It might be, you can't tell; if they happen to get mixed we have to move some of them to find them.

By Mr. WHEELER:

Q. Do I understand you to say that your method of loading these ships is as far — possible to put each kind of goods by themselves?
A. Yes, sir.
Q. So that the dry goods and the wet goods would go in different compartments and so on?
A. Yes, sir.
Q. So the stowage is made more with reference to the quality of the goods than with reference to the port of destination?
A. Yes, sir.

Respondent rests, except as to certain dates.

33 CLIMACO CALDERON, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. WARD:

Q. You are the libellant?
A. Yes, sir.
Q. Do you remember the day and the time of day when these goods for which we bring this libel were shipped, delivered at the pier of the Atlas Steamship Company?
A. Yes, sir; I remember it very well.
Q. What was the day?
A. The 19th of July.
Q. The day the ship sailed?
A. Yes, sir.
Q. Have you any recollection of the time?
A. Yes, sir; I remember very well that that morning about half past nine a boy came to me saying that they wanted to have a shipping permit from the Atlas Steamship Company.

Mr. WARD: I have given my friends notice to produce the shipping permit and they tell me that they haven't it.

(Answer continued.) I said they don't use to give ordinary permits on the sailing day; I went downstairs to the office because I had my office in the same building, and saw Mr. Frank Earl, the clerk who gives the permits, and he gave me a special permit, which is customary; I remember very well that he gave me a permit to have those goods delivered at the pier not later than one o'clock.

Q. For the *Ailsa?*

A. Yes, sir.

By Mr. WARD:

Q. What did you do with the permit?

A. I gave the permit to the boy and he took it to the cartmen and they went down to the pier of the steamer and they sent the shipping receipt to me.

Q. You surrendered the permit and got the bill of lading?

A. I surrendered the shipping receipts and they gave me the bill of lading signed.

By Mr. WHEELER:

34 Q. What time did you get the bill of lading that day?

A. It was before—I remember very well this, I got those bills of lading signed not later than one o'clock, something like that.

Q. Did you forward one of them by the mail on that steamer?

A. Yes, sir.

Q. I notice there are 29 packages, 26 bales and 6 crates—were they of about equal value?

A. I think about the same.

Testimony closed.

U. S. District Court, Southern District of New York.

CLIMACO CALDERON
against
THE ATLAS STEAMSHIP COMPANY, LIMITED.

Testimony of Albert Haake, a witness on behalf of respondent, taken pursuant to stipulation, before James Moore, notary public, at 45 William street, New York, November 22d, 1894.

Present: Mr. J. Langdon Ward (North, Ward & Wagstaff) for libellant; Mr. John S. Woodruff (Wheeler & Cortis) for respondent.

Mr. WOODRUFF: I offer in evidence the shipping receipt and shipping permit.

Received and marked Exhibits 3 and 2 respectively of this date.

The witness having been duly sworn, testified as follows:

Direct examination by Mr. WOODRUFF:

Q. What is your occupation?
A. I am foreman for Mr. Carter, the stevedore on the Atlas dock.
35 Q. Were you employed on the Atlas dock in July, 1892?
A. Yes.
Q. You were at work there at the time of the *Ailsa's* departure in that month?
A. Yes.
Q. Do you remember anything in connection with the receipt of a consignment of goods?
A. I don't know anything about the receipts; the goods arrived just shortly before the ship went away.
Q. On the same day of the sailing?
A. Yes, between 11 and 12 o'clock.
Q. In the morning?
A. Forenoon, yes.
Q. These were the 29 cases that were consigned by Mr. Calderon to Savanilla?
A. Yes.
Q. Do you know where those goods were put?
A. No. 3 hatch.
Q. Were they put in with other goods consigned to Savanilla?
A. No, there was only a little bit of cargo—for Carthagena. It was at the last minute.
Q. The other cargo in that hold was consigned to Carthagena?
A. Yes.
Q. Why was it put in that hold?
A. Because we had no other place to put it but that place.
Q. At the time the cargo was received then you say you put it in that hatch because that was the only place to put it?
A. Yes.

Cross-examination by Mr. WARD:

Q. You don't mean to say there was no other Savanilla cargo?
A. Down below the ship was full, it was just the last minute.
Q. There was other Savanilla cargo in No. 3 hold?
A. No, sir; not in No. 3, in No. 1 and in No. 5. At the last moment the ship just going out, those goods had to be put in a special place; we can't put them where the people can go through them. That wouldn't do.
Q. How many goods were there loaded on board after these goods?
A. None.
Q. They were the last goods put in?
A. Yes, sir.

26 Ex. 1, Nov. 13, '94.

Atlas Steamship Co. (Limited).

And Barranquilla Railway & Pier Co. (Limited).

Through Bill of Lading from New York to Barranquilla via Savanilla.

Pim, Forwood & Co., agents, 24 State street, New York.

Received, in apparent good order and condition by the Atlas Steamship Company, Lim'd, from Climaco Calderon :

Marks.	No.	Packages.
Ministerio De..... Guerra Bogota.....	1/26,	26 bales duck uniforms.
	27/9,	3 crates " "
Total.....	29	Freight, $39.43. Packages mdse.

to be transported by the good British steamship *Ailsa*, now lying in the port of New York, and bound for Puerto, Colombia (Savanilla), or so near thereto as she may safely get, with liberty to call at any other port or ports, in any order of rotation, within latitudes 43° 10′ and 6° 30′ N., and longitudes 30° and 100° W., whether in or out of the customary or advertised route, without same being deemed a deviation, whatever may be the reason for calling or entering such port or ports, being marked and numbered as above (weight, quality, contents, and value known), there to be delivered to the Barranquilla Railway & Pier Co., or their agents, for conveyance to Barranquilla, and to be delivered in like good order and condition, and subject throughout the entire transit, and while the goods are in the custody of the carrier to the terms and conditions stated in this bill of lading, which constitutes the contract between the shippers, the Barranquilla Railway and Pier Company, and the Atlas Steamship Company, at the port of
37 Barranquilla, unto Admer Aduacia, or to his or their assigns, freight on the said goods to be paid by the shippers, on signing of this bill of lading, at the rates stipulated above, with other charges, if any (and is not to be refunded), vessel or goods lost or not lost. General average payable according to York-Antwerp rules of 1890. All liability of every kind of the Atlas Steamship Company shall cease on delivery of the goods to the Barranquilla Railway & Pier Company.

In accepting this bill of lading the shipper(s) agree(s) that all questions arising under the same shall be construed according to the laws of Great Britain as administered in Great Britain.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading

agree to be bound by all of its stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the master or agent of the said ship hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, this 19 day of July, 1893.

H. WIENER,
For Agent, Severally but not Jointly.

(Endorsed.)

It is mutually agreed that the ship shall have liberty to sail with or without pilots; to carry goods of all kinds, dangerous or otherwise; to tow and assist vessels in all situations; to proceed to the ultimate port of destination via any other port or ports in any order or rotation, whether in or out of the customary or advertised route, and whether such port is in the ordinary course of the voyage beyond the port of the destination of the goods or not, whatever may be the reason for calling at or entering such port or ports, and to deviate for all or any of the above purposes, and with liberty, in the event of the steamer putting back to port of sailing, or into any
38 port, or being otherwise prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail, or in tow of any other vessel, or in any other manner which the ship-owner shall think fit, and to ship or tranship the goods by any other vessel, and with liberty also before shipment, or at any period of the voyage, and so often as may be deemed expedient, or at any port or place to ship the whole or part of the goods by any other steamer, or to tranship or land and store and put into hulk or craft for such time as may be deemed expedient, and thence reship by lighter or otherwise the goods, and to forward them by any other conveyance to the port of destination, extra compensation to be paid for such service; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by a vessel or vessels of the carrier for the time being, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond its control, by the perils of the sea, or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any

of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks,
39 numbers, address or description; nor for risk of craft, hulk or transhipment; nor for damage of any kind resulting from fumigation or any other action of sanitary authorities in consequence of quarantine or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and that such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case of quarantine, the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch; or should this be impracticable, or the ship not be admitted, the master may proceed on his voyage and land the goods at the nearest safe port (in his opinion) at the risk and expense of the owners of the goods, or retain them on board till ship returns. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the owners of the goods, or otherwise, whether in the ship's hold, in lighter, hulk, craft, or on shore.

5. Also, the master of the vessel has the option of hiring lighters at the port of destination for the landing of the within goods, at
40 the expense and risk of the owners of said goods; and if this in his judgment is inexpedient, the goods to be taken from the ship's tackles, where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in warehouse, on the company's wharf, or sent to the public store, as the authorities at the port of discharge shall direct, and when deposited in the warehouse to be subject to storage and other charges as customary. If by reason of the want or impossibility of obtaining lighters, in the master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on

board, and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignees, and the company shall not be responsible for damage or loss as the consequence thereof.

6. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the invoice cost of goods when shipped, and the carrier has the option of replacing the goods at his expense. Notice of any claim arising under this bill of lading must be given by the consignee to the company's agent at the port of destination within 48 hours after the landing of or failure to deliver the goods.

9. Also, in case any part of the goods cannot be found
41 for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise.

10. Also, in case the surf or state of the weather upon the arrival of the steamer shall be such as to render it, in the master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another steamer at the risk and expense of the owner or consignee of the goods.

11. Also, that the company may land said packages, or any of them, at any intermediate port. In such case it will either place them upon the wharf used by the company, or store them. If placed upon the wharf, all the conditions and agreements of this bill of lading shall be in force while they remain there. If stored, the liability of this company shall cease altogether during said storage. The place of storage does not belong to the company and is not managed by it. When this company shall have delivered said packages or any of them to any other carrier to be transported to their destination, its liability shall cease altogether. This agreement is made with reference and subject to the provisions of the United States Revised Statutes, sections 4281 to 4287, limiting the liability of ship-owners, and to the rules of the United States Supreme Court, made in pursuance thereof.

12. Also, in case of the blockade or interdict of the port of destination, or if without such interdict, the entering of the port of discharge should be considered unsafe, by reason of war or disturbances, the master to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in the warehouse, and a letter being put into the post-office addressed to the shipper and consignee, if named, stating the landing, and where deposited, the goods to be at the

shipper's and consignee's risk and expense, and the company to be discharged from all responsibility.

42 13. Also, any duty, tax, or impost, of whatever nature, levied upon the steamer by the authorities at the port of discharge, for or in connection with the goods herein described, to be paid by the consignees of the goods before delivery.

14. This agreement is made with reference to, and subject to, the provisions of the U. S. carriers' act, approved February 13th, 1893.

PIM, FORWOOD & CO., *Ag'ts.*

RESPONDENT'S EX. 2, NOV. 22, '94.

Atlas Steamship Company.

NEW YORK, 17 *July*, 1893.

Received from J. G. Polo on 19th inst. for S. S. *Ailsa* to 12 m. at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading, ab't 50 cases uniforms or bales.

(Signed) R. G. Gemmell.

(In margin:) All goods to have port of destination for which they are intended distinctly marked upon them, otherwise the company will not be responsible for the correct delivery of the goods.

RESPONDENT'S EX. 3, NOV. 22, 1894.

Atlas Steamship Co.

(Cut of flag.)

Pim, Forwood & Co., agents, 22 & 24 State street.

NEW YORK, *July* 19, 1893.

Received in good order, on pier 55 N. R., from Messrs. T. M. Turner for shipment by the steamship *Ailsa* to —— at the ship-

43 per's risk from fire, and subject to the conditions expressed in the company's form of bill of lading. *All goods to have port of destination for which they are intended distinctly marked upon them, otherwise the company will not be responsible for the correct delivery of the goods.*

Ministerio de Guerra,
Barranquilla,
Bogota,
Twenty-six (26) bales clothing.
1/26
Three (3) coats caps.
27/29

Thos H Stacey,
Receiving Clerk.

(In margin:) The within-named goods while on quay or wharf, in steam-tender barges, or elsewhere, previous to shipment, to be at shipper's risk, and all risk of river craft, lighterage and fire to be borne by the shipper.

(Endorsed on back:) The attention of shippers is called to the following:

Petroleum, oil of vitriol, matches, gunpowder and all goods of an explosive, inflammable, or otherwise dangerous nature, will not be taken except under special agreement made with the agents, and written notice must be given to them before shipment thereof.

Act of Congress of 1851.

"Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment, a note in writing, expressing the nature and character of such merchandise to the master, mate or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

44 United States District Court, Southern District of New York.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED.

In admiralty. Action for non-delivery of goods.

North, Ward & Wagstaff, for libellant.
Wheeler & Cortis, for respondent.

BROWN, *J.*:

On the 19th of July, 1893, the libellant delivered to the respondent, the owner of the steamships *Ailsa* and *Alvo*, in the city of New York, twenty-six bales and three crates of duck uniforms, to be transported to Baranquilla by way of Savanilla. The goods were taken to the wharf and delivered to the steamer *Ailsa* a few hours before she sailed. The steamers above named belong to the Atlas line, and were accustomed to touch at southern ports in the following order: Kingston, Savanilla, Carthagena, Port Limon and thence back direct to New York. The *Ailsa* arrived in due course at Savanilla, where she discharged other cargo; but the libellant's goods were overlooked, and the failure to discharge them was not discovered until she was well on her way towards Carthagena, the next port, 76 miles distant. Having to take on bananas—perishable cargo—at Port Limon, the last port, which were in waiting for her regular sailing days, and there being no other means of sending back the goods to Savanilla after the non-delivery was discovered, they were brought back to New York, where the *Ailsa* arrived on

the 16th of August, and immediately reshipped them on
45 board the *Alvo*, which sailed on the same afternoon, and on her way out foundered at sea in a hurricane, in which ship and cargo were a total loss. The above libel was filed to recover the value of the 29 packages above named, amounting to about $5,600.

In the body of the bill of lading was the provision that the steamer had liberty to call at any other port or ports in any order of rotation, etc., and that the owner and consignee agreed to be bound by "all the stipulations, exceptions and conditions as printed on the back thereof, whether written or printed, as fully as if they were all signed by the owner, consignee or holder." On the back were endorsed numerous exceptions, among others, that of perils of the seas, followed by nine numbered clauses, three of which only are material here: (1) That the "carrier should not be liable * * * for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made." (9) "Also in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity when found, at the company's expense; the steamer not to be held liable for any claim for delay or otherwise." Last: "This agreement is made with reference to and subject to the provisions of the U. S. carriers' act, passed February 13, 1893. (Signed) Pim, Forwood & Co., agents."

The libellant had been accustomed to ship goods previously by the same line in numerous instances, upon bills of lading of the same character. Having delivered the goods to the *Ailsa* only a few hours before sailing, he did not receive the present bill of lading until after she sailed; but at the time of delivery he received a shipping receipt for the goods stating that they were subject to the conditions expressed in the company's form of bill of lading; and the bill of lading in the usual form as above expressed was afterwards delivered to him. Under such circumstances he must be deemed to have had full knowledge of the conditions en-
46 dorsed on the back of the bill of lading, and referred to in the body of it, and to have acquiesced in and agreed to those conditions, so far as they were lawfully inserted and were legally valid. Potter *v.* The *Majestic*, 60 Fed., 624. The provisions of the act of Congress of February 13, 1893, known as the Harter act, which is the last of the stipulations endorsed, supersedes all the other provisions that are inconsistent with it, either in the body of the bill of lading or endorsed upon it.

The provisions of the act last cited (2d Sup. Rev. St. Ch. 105, p. 81) provide that it "shall not be lawful to insert in any bill of lading any agreement whereby the owner shall be relieved from liability for loss or damage arising from negligence, fault or *failure* in the proper loading, stowage, custody, care or *proper delivery* of any and all lawful merchandise or property committed to its or their charge; any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

If, therefore, the respondents are chargeable with negligence or failure in the proper loading, stowage or proper delivery of these goods, they are liable for the damages arising therefrom, anything else in the bill of lading, or in the provisions endorsed thereon, to the contrary.

It is plain that, independently of the ninth clause endorsed on the bill of lading as above quoted, there was "a *failure* in the *proper* delivery" of these goods. "Proper delivery" includes a timely delivery. It does not permit goods to be carried voluntarily away from the port of destination upon another voyage. The defence must, therefore, rest on the stipulation of the bill of lading. But the Harter act prohibits the *insertion* of any stipulation excusing a "failure in proper delivery." The words "proper delivery" as used in the act cannot mean any kind of a delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which was designed to protect shippers against the imposition
47 of unreasonable stipulations in bills of lading to the prejudice of their interests. It is, perhaps, competent for the parties to make special provisions as to the mode of delivery, having reference to the usual ways of business, and the conveniences or necessities of vessels in touching at various ports; and in so far as these stipulations are shown by the circumstances to be reasonable, they may be upheld as defining what a "proper delivery" shall be, and may thus justify what might not otherwise be held to be a proper delivery. Farther than this such stipulations cannot go without subverting the purpose of the act.

It is contended for the respondent that the ninth clause is a reasonable one, inasmuch as the necessities of proper stowage and distribution of a mixed cargo for the safety of the ship, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call, because they cannot be found at the time when they ought to be discharged; and that the ship, being under the necessity of making trips at regular dates, without delays that would be injurious to perishable cargo waiting for it, should not always be bound to wait for a general overhauling of cargo not destined for a port of call, but should have the privilege in such cases of forwarding the goods afterwards when found at its own expense.

Conceding the reasonableness and validity of the stipulation in the present case, it manifestly must be applied with strictness as against the carrier. It cannot be sustained as a defence where the failure to find and deliver the goods has resulted from any negligence in the stowage or care of the goods with reference to the convenient finding and delivery of them at the port of call; or where there has been any remissness in such search for the goods as is practicable at the time; and the burden of showing diligence in these respects is upon the carrier.

48 The respondent's evidence in the present case wholly fails to meet these requirements. If, as one witness states, the

goods were placed at the *bottom* of No. 3 hold, with goods for Carthagena stowed above them, that was negligence in stowage of Savanilla cargo, unless it was designed to discharge all the goods in No. 3 hold at that port. There is, moreover, no evidence of any endeavor whatsoever to *find* the goods at Savanilla. The limitation of the ninth clause, viz: "if the goods cannot be found" is certainly not a meaningless provision. It is of the very essence of any reasonableness in that stipulation, that all reasonable efforts shall be made to find the goods, as well as to avoid burying them at the port of shipment in places where they cannot or are not likely to be found. Here there is no evidence of care in either respect. The failure to deliver the goods does not seem to have been even noticed until the vessel had left Savanilla and was well on her way to Carthagena. The inference, therefore, is that the cause of the overcarriage was mere inattention in stowing or in discharging. I must find, therefore, that there was a "failure in the proper delivery" of the goods at Savanilla, not excused by anything in the testimony or in the bill of lading.

As the respondent fails to justify its carriage of the goods beyond their destination, the case as respects these goods becomes one of deviation. The vessel, it is true, did not herself depart from her course or delay her contemplated voyage; but she continued the carriage of these particular goods upon the high seas long beyond what the contract allowed, exposing them to three times the sea perils contemplated, and in the end shipped them upon another vessel from the original port of departure, whereby they were lost through sea perils.

It is urged that the final loss of the goods was by a hurricane, an extraordinary sea peril, which was an accidental result, and not a proximate or natural result, of the overcarriage. The cases of R. R. Co. *v.* Reeves, 10 Wall., 176; the R. D. Bibber, 8 U. S. App.,
49 42; 2 C. C. A., 50; 50 Fed., 841; Denny *vs.* N. Y. C. R. R. Co., 13 Gray, 481; Hoadley *vs.* Northern Trans. Co., 115 Mass., 304; Mich. Cent. R. R. Co. *v.* Burrows, 33 Mich., 6, are cited in support of this contention. None of these cases, however, are cases of voluntary or negligent deviation in the carriage of goods by sea. In marine transportation it is well settled that any unauthorized overcarriage of goods, or a shipment of them by another vessel than that contracted for, renders the carrier liable as insurer, both for violation of the contract and because the shipper's insurance is thereby avoided, and he has no opportunity to protect himself by the ordinary security of marine insurance. These reasons apply more emphatically in this case than in ordinary cases of deviation. For these goods were brought back to the very point of starting; no notice was given to the shipper; he was ignorant of the facts, and the opportunity was not given him to insure that might have been given. The cases above cited have never been applied, so far as I know, to cases of maritime deviation. I must, therefore, hold the respondent liable as insurer. 1 Pars. Ship. & Adm., 171, note, and many cases there cited; Ellis *v.* Turner, 8 T.

R., 531; Trott *v.* Wood, 1 Gall., 443; Bazine *v.* SS. Co., 3 Wall., Jr., 229; 2 Fed. Cas., 1097; The *Bordentown*, 40 Fed., 682, 689.

It is further contended that under the first clause of the bill of lading the libellant's recovery cannot exceed $100 per package, as the value was not made known, nor any agreement made for the payment of freight at an extra rate. The validity of stipulations of this character has been repeatedly upheld by the Supreme Court. N. Y. Cent. *v.* Fraloff, 100 U. S., 24, 27; Hart *v.* Pa. R. R. Co., 112 U. S., 331; Magnin *v.* Dinsmore, 70 N. Y., 410; Baldwin *v.* Liverpool, 74 N. Y., 125; and recently in the court of appeals of this circuit in Potter *v.* The *Majestic*, 60 Fed., 624, 630.

It is urged that effect ought not to be given to this stipulation, because literally read it provides that the carrier shall not
50 be liable for *anything* in this case; and that this is so unreasonable that the stipulation should be allowed no effect at all. I do not think that construction was the intention of the stipulation, or that it is a reasonable construction of it. Literally, the goods which are above $100 in the package may be excluded from consideration, and only those which amount to $100 be regarded. This, I think, is the fair intention of the clause in question; and as the decisions cited sustain it as thus construed, I must hold accordingly, and allow a decree for the libellant for $2,900 for the twenty-nine packages, with interest and costs.

Dated New York, December 3, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-rooms in the city of New York on Monday, the 31st day of December, 1894.

Present: Hon. Addison Brown, district judge.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED.

This cause having come on to be heard upon the pleadings and proofs of the respective parties, now after hearing argument of counsel, due deliberation having been thereupon had, and the court being fully advised in the premises, and on motion of North, Ward & Wagstaff, Esqs., proctors for the libellant, it is

Ordered, adjudged, and decreed that Climaco Calderon, the libellant, do recover of The Atlas Steamship Company, Limited, the respondent, the sum of twenty-nine hundred dollars as and
51 for his damages by him sustained in respect of the matters in the libel herein set forth, together with interest thereon from the nineteenth day of July, A. D. 1893, to the date of this decree, amounting to the sum of two hundred and fifty-two dollars and twenty-six cents, and his costs and disbursements of this cause to be taxed, and as taxed, amounting to the sum of forty-two dollars and eighty-five cents, in all the sum of three thousand one hundred and ninety-five dollars and eleven cents, and that he have execution therefor. ADDISON BROWN.

(Endorsed:) Final decree. Filed Dec. 31, 1894.

District Court of the United States for the Southern District of New York.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED. } In Admiralty.

GENTLEMEN: You will please to take notice that the libellant above named hereby appeals to the United States circuit court of appeals for the second circuit from the decree of this court, made and entered herein, and dated the 31st day of December, A. D. 1894.

Dated New York, January 2d, 1895.

Yours, &c., NORTH, WARD & WAGSTAFF,
Libellant's Proctors.

Wheeler & Cortis, Esqs., respondent's proctors.
Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Jan'y 7, 1895.

52 District Court of the United States for the Southern District of New York. In Admiralty.

CLIMACO CALDERON
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED.

Libellant's Assignment of Error.

The libellant, appellant, assigns for error in the decree of this court in the above-entitled cause:

First. That this court held that this libellant was bound by "the stipulations, exceptions and conditions" printed upon the back of the bill of lading set out in the libel herein.

Second. That this court held that of said stipulations, exceptions and conditions the clause numbered (1), and in part in the words and figures following, to wit: "The carrier shall not be liable for gold, silver, bullion * * * or for goods of any description which are about the value of $100 per package unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made" was a reasonable condition, binding upon this libellant, and to be construed as a limitation of the liability of the respondent to the sum of one hundred dollars per package for the libellant's goods.

Third. That this court held that this libellant was limited in his recovery to the sum of one hundred dollars for each package of merchandise lost.

Fourth. That this court decreed that this libellant recover
53 of the respondent the sum of twenty-nine hundred dollars as and for his damages by him sustained in respect of the

matters in the libel herein set forth instead of the actual amount of said damages to be determined by a commissioner of this court, and amounting to fifty-four hundred and thirteen dollars and eighteen cents, without interest.

Fifth. That the decree herein is for twenty-nine hundred dollars damages instead of fifty-four hundred and thirteen dollars and eighteen cents damages.

NORTH, WARD & WAGSTAFF,
Libellant's Proctors.

(Endorsed:) Assignment of errors. Filed January 7, 1895.

54 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

CLIMACO CALDERON, Libellant and Appellant,
vs.
THE ATLAS STEAMSHIP COMPANY, LIMITED, Respondent and Appellee.

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause, made up pursuant to rule No. 4, in admiralty, of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the south-
[SEAL.] ern district of New York, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

SAMUEL H. LYMAN, *Clerk.*

55 United States Circuit Court of Appeals, Second Circuit.

CLIMACO CALDERON, Libellant, Appellant,
vs.
THE ATLAS STEAMSHIP COMPANY, Respondent, Appellee.

This is an appeal from a decree of the district court, southern district of New York, in favor of the libellant for $2,900 with interest and costs, the appellant contending that the decree erroneously limited his recovery.

LACOMBE, *Circuit Judge:*

Libellant shipped twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the collector of customs, for which respondent issued its bill of lading. The goods were not landed at Savanilla, but were brought

back to New York and reshipped on the "Alvo" of the same line, which was lost at sea on the voyage with all on board. The actual value of the goods lost was $5,413.18.

Inasmuch as the respondent has not appealed, the only question before this court is whether the district court erred in limiting the amount of libellant's recovery to $100 per package under the bill of lading.

The bill contained on its face the following provision:

"And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of
56 lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were signed by such shipper, owner, consignee or holder."

On the back of the bill of lading, among numerous other clauses, was printed the following:

"1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made."

Stipulations in bills of lading, limiting the amount of the carrier's liability on each package carried to some stated sum, unless the value of the package is declared, and a special agreement made, have been repeatedly held valid, and such reasonable regulations for the conduct of the carrier's business so as to prevent imposition upon him, and to establish proper charges adequate to the extent of the risks to be undertaken, may be communicated to the shipper by notice printed upon the carrier's receipt (Hart *vs.* Pennsylvania R. R., 112 U. S., 331; Railroad Co. *vs.* Fraloff, 100 U. S., 24; Potter *vs.* The Majestic, 60 Fed. Rep., 624). It is contended that the clause above quoted is not such as these authorities sanction, namely, a reasonable regulation to protect the carrier from excessive loss, where the hazardous character of the goods, or the fact that they are valuable, is not disclosed to him, but is rather a clause undertaking to relieve the carrier entirely from his common-law liability, and therefore not enforceable. The language used, "Shall not be liable for gold, * * * or for goods of any description which are above the value of $100 per package, unless," &c., if literally construed, would no doubt import that the carrier shall be liable for nothing in the package if its value is over $100. But a more reasonable interpretation is that adopted by the district judge,
57 namely, that the goods which are above the $100 in the packages may be excluded from consideration, and only those which amount to $100 be regarded. Being a clause in a written form of contract prepared by the carrier, and susceptible of two constructions, it is to be construed in favor of the other party, and, as thus construed, it applies only to such of the goods in each package as are in excess of the stipulated value, and is therefore within the authorities above cited.

The decree of the district court is affirmed, with costs of this court to the appellee.

(Endorsed:) U. S. circuit court of appeals, second circuit. Climaco Calderon *vs.* The Atlas Steamship Company. Opinion, Lacombe, J. United States circuit court of appeals, second circuit. Filed Jul- 30, 1895. James C. Reed, clerk.

U. S. Circuit Court of Appeals, Second Circuit.

CALDERON, Appellant,
vs.
THE ATLAS STEAMSHIP CO., LIM., Appellee.

WALLACE, *Circuit Judge:*

I dissent from the judgment of the court in this case. The twenty-six bales of goods in controversy were shipped by the libellant at New York for transportation to and delivery at Sava-
58 nilla. The goods were not delivered by the steamship, but were forgotten and overlooked by those in charge of her while she was being unloaded at Savanilla. After she had left the port the goods were discovered, and were taken back by the steamship to New York and thence reshipped to their original destination on board another vessel, which foundered at sea, and the goods were lost. The corporation owning the steamship attempts to escape liability for the loss of the goods by a defense founded upon a condition in the bill of lading, which reads as follows: "In case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise." The bill of lading contained also another condition, which reads as follows:

"This agreement is made with reference to, and subject to, the provisions of the U. S. carrier's act, passed February 13, 1893." By that act, commonly known as the Harter act (27 U. S. Statutes at Large, 445), it is provided, among other things, that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause or agreement whereby the vessel shall be relieved "from liability for loss of damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of any merchandise committed to its charge, and that any words of such import inserted in the bill of lading "shall be null and void and of no effect." The court below correctly decided that the condition relied upon was in direct contravention of the statute which the parties by express agreement had incorporated into the bill of lading, and, therefore, ineffectual to absolve the steamship company from liability for the failure, through negligence, to make proper delivery of the goods. But the court also decided that the steamship company was entitled to a
59 partial exemption from liability because of another condition in the bill of lading which reads as follows: "It is also

mutually agreed that the carrier shall not be liable for gold, silver, bul-ion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." In the opinion it was conceded that the condition, if read literally so as to exempt the carrier wholly for goods in packages exceeding in value $100, would be too unreasonable to be sustained; but the court concluded that it should be construed as intended to exclude liability beyond $100 for goods in any one package, and as so construed was a reasonable one, and therefore valid.

This court in the prevailing opinion has adopted the conclusions of the court below. The construction thus given to the condition seems to me ignores its explicit terms, expressed in the plainest possible language. I think the condition was intended to exempt the carrier wholly in case of loss or damage to any goods of the several kinds mentioned in it, including those the value of which would exceed $100 per package. To uphold such a condition would permit a carrier, receiving goods which he may know are worth more than $100 per package, to absolve himself from all responsibility in respect to them; and thus divest himself altogether of the obligations which are inseparable from his occupation.

But if the condition is capable of being read so as to exempt the carrier from liability beyond the amount of $100 for each package, it does not include a liability for a negligent loss of the goods. In construing in a bill of lading the exceptions to the carrier's liability the rule obtains both in the English courts and our own that where the words leave the intention in doubt they are to be construed against him, and their meaning is not to be extended to give him a protection for which he has not bargained in clear terms;
60 and it is therefore to be presumed, unless the contrary is stated, that he is to continue liable for negligent acts and faults committed by himself or his servants. General words exempting him from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the act of Congress. In order to give it any effect it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; and the cases of Hart *vs.* Pennsylvania R. R. (112 U. S., 331); Muser *vs.* Holland (17 Blatch., 412); Groves *vs.* R. R. Co. (137 Mass., 33), and several others which might be cited where the contract was of that description, are not in point.

In Hart *vs.* Pennsylvania R. R., the court say:

"The agreement as to value, in this case, stands as if the carrier

had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." And in concluding the opinion the court used the following language: "The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

61 There is no injustice in restricting a shipper's claim to damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried the parties are bound to that value in case of loss (McCance *vs.* L. & N. W. R. Co., 34 L. J., Ex. 39). Where there is an agreed valuation stated in the contract, that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability, the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered after the steamship company had received the goods, and as delivered it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of $100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption therefrom does not reach a loss by the carrier's negligence. This was distinctly adjudged in Magnin *vs.* Dinsmore (56 N. Y., 168) and Westcott *vs.* Fargo (61 N. Y., 542), and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary; in Belger *vs.* Dinsmore (51 N. Y., 156), where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same court held the carrier's liability to be limited to that sum in the absence of the statement, although the loss was by his own negligence.

62 The authorities are elaborately considered and reviewed in Louisville R. R. Co. *vs.* Wynn (88 Tenn., 320), and the conclusion reached that a condition limiting the liability of a carrier in case of loss to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

The steamship company could have exacted from the libellant a statement of the value of his goods if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value, but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence.

For these reasons I think there should be a reversal of the decree below, and a decree for the libellant for the whole value of his goods.

(Endorsed:) U. S. cir. ct. of appeals, second cir. Calderon, appellant, *vs.* The Atlas Steamship Co. (Lim.), appellee. Wallace, C. J. United States circuit court of appeals, second circuit. Filed Jul- 30, 1895. James C. Reed, clerk.

63 UNITED STATES OF AMERICA, } *ss.:*
Southern District of New York, }

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to 62, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Climaco Calderon, libellant and appellant, against The Atlas Steamship Company (Limited), respondent and appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-sixth [L. s.] day of November, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and twentieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

64 UNITED STATES OF AMERICA, *ss.:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which Climaco Calderon is appellant and The Atlas Steamship Company, Limited, is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said

circuit court of appeals and removed into the Supreme Court
65 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

66 [Endorsed:] Supreme Court of the United States. No. 806, October term, 1895. Climaco Calderon *vs.* The Atlas Steamship Company, Limited. Writ of certiorari.

67 United States Circuit Court of Appeals for the Second Circuit.

CLIMACO CALDERON, Libellant, Appellant,
vs.
THE ATLAS STEAMSHIP COMPANY (LIMITED), Respondent, Appellee.

It is hereby stipulated between the parties that the certified copy of the record in this cause, which was certified by the clerk of this court and filed in the Supreme Court of the United States, with a petition for a writ of certiorari presented by the appellant herein, may be taken to be the return to the writ of certiorari issued by the Supreme Court of the United States with like effect as if the same had been certified to the said Supreme Court by the said clerk of the circuit court of appeals under said writ.

J. LANGDON WARD,
Counsel for Appellant.
EVERETT P. WHEELER,
Advocate for Appellee.

A copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

68 [Endorsed:] United States circuit court of appeals for the second circuit. Climaco Calderon, libellant, appellant, *vs.* The Atlas Steamship Company (Limited), respondent, appellee. Stipulation as to return to certiorari. J. Langdon Ward, proctor for appellant.

69 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed,

and, under the direction of counsel for the appellant, said stipulation is certified as a return to this writ.

New York, December 27, 1895.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

70 [Endorsed:] Case No. 16,096. Supreme Court U. S., October term, 1896. Term No., 378. Climaco Calderon, appellant, *vs.* The Atlas Steamship Co. (Limited). Writ of certiorari and return. Filed Dec. 30, 1895.

Endorsed on cover: Case No. 16,096. U. S. circuit court of appeals, second circuit. Term No., 378. Climaco Calderon, appellant, *vs.* The Atlas Steamship Company, Limited. Filed November 30, 1895.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

CLIMACO CALDERON, PETITIONER.

Petition for writ of certiorari requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of Climaco Calderon, appellant, vs. The Atlas Steamship Company, Limited, respondent.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Climaco Calderon respectfully shows to this Honorable Court as follows:

FIRST. That your petitioner is, and since the year 1885 has been, the Consul-General of the United States of Colombia in the City of New York. That on or about the 19th day of July, in the year one thousand eight hundred and ninety-three, he delivered to The Atlas Steamship Company, Limited, twenty-six bales and three crates of duck uniforms consigned to the Minister of War at Bogota in the United States of Colombia, to be transported by the British steamship "Ailsa," then lying in the Port of New York, to Savanilla, and there to be delivered to the Barranquilla Railway and Pier Company or their agents, for conveyance to Barranquilla, there to be delivered to the Collector of Customs, for the consideration of $39.43, which your petitioner then and there paid.

SECOND. That at the time of the delivery of the said goods to the Atlas Steamship Company, Limited, there was issued to the cartman a receipt reciting that the said goods were received on the pier for shipment by the steamship "Ailsa" to , at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading, which receipt was thereafter delivered to your petitioner, and thereafter surrendered to the Atlas Steamship Company, Limited, and bills of lading issued to him therefor, all of like tenor and date, reciting that said goods had been received in apparent good order and condition from your petitioner to be transported by the said steamship to Savanilla, there to be delivered to the Barranquilla Railway and Pier Company, or their agents, for conveyance to Barranquilla.

In the said bills of lading there occurred the following clauses:

"In accepting this bill of lading the shipper agrees that all questions arising under the same shall be construed according to the laws of Great Britain, as administered in Great Britain."

"And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of these stipulations, exceptions and conditions as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder."

THIRD. That on the back of said bills of lading, there was printed a long endorsement containing, among other things, the following:

"1. It is also mutually agreed that the carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embroideries, Works of Art, Furs, Silks, China, Porcelain, Watches, Clocks, or for Goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor with the value therein expressed and a special agreement is made.

"9. Also in case any part of the goods cannot be found for delivery during the steamship's stay at the port of destination, they are to be forwarded by first opportunity when found at the Company's expense, the steamer not to be held liable for any claim for delay or otherwise.

"14. This agreement is made with reference to and subject to the provisions of the United States Carriers Act, approved February 15, 1893."

FOURTH. That the steamship "Ailsa" having the said goods on

board, proceeded on her voyage from New York and arrived safely at Savanilla, but the goods so shipped by your petitioner were not there discharged as they should have been, but were carried on to Cartagena, and from thence back to New York and there reshipped on the steamship "Alvo," then bound for Savanilla, which vessel having said goods on board sailed on her intended voyage, but never arrived at her port of destination, having been lost at sea with all on board.

FIFTH. That your petitioner was not advised of the non-delivery of the said goods at Savanilla, or of their reshipment on the steamship "Alvo" until after the same had been lost.

SIXTH. That thereafter, and on or about the 2d day of March, 1894, your petitioner exhibited his libel in the District Court of the United States for the Southern District of New York in the Second Circuit, claiming to recover from the said Atlas Steamship Company, Limited, the sum of $5,600 for the value of the merchandise so shipped by him and lost as aforesaid.

SEVENTH. That thereafter such proceedings were had in the said District Court under the said libel, that the said respondent The Atlas Steamship Company, Limited, was held to be liable for the loss of the said merchandise, because caused by its negligence, but it was held by the said Court that such liability was limited to the sum of $100 for each package of goods shipped by your petitioner by reason of the clause printed upon the back of said bill of lading, purporting to set forth a mutual agreement that the carrier should not be liable for goods of any description which were above the value of $100 per package, unless bills of lading were signed therefor, with the value therein expressed and a special agreement made. And thereupon and thereafter a decree was entered in said District Court in favor of your petitioner and against the said Atlas Steamship Company, Limited, for the sum of $2,900, as and for your petitioner's damage by him sustained in respect of the matters in the said libel set forth, with interest and costs.

EIGHTH. That the decision of the said District Court proceeded upon the ground that, notwithstanding there was no pretense that your petitioner had assented to the provisions and conditions printed on the back of said bill of lading in any way other than by

receiving the same, or that his attention had been called thereto, or that he had knowledge thereof, except that, on eight or ten occasions within three or four years, your petitioner had made shipments of goods on the respondent's steamers for which it was claimed that similar bills of lading had been issued ; and, notwithstanding the decision of this Honorable Court in the case of " Railroad Company vs. Manufacturing Company," 16 Wallace, 318, your petitioner was bound by the clauses printed on the back of the said bills of lading above recited ; and that, notwithstanding your petitioner had no part in framing said condition, which was wholly devised by the carrier, and notwithstanding the literal, natural and ordinary import of its wording was to exempt the carrier from any liability whatsoever in respect of the several classes and descriptions of goods therein mentioned even though lost or damaged through its own fault or negligence which rendered the whole condition void under the decisions of this Court and the provisions of the act, approved February, 13, 1893, entitled " An Act relating to navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property " ; and notwithstanding no other construction than that of absolute exemption of the carrier from any liability whatever in respect of loss, damage or injury to goods, however caused, in fifteen out of the sixteen classes of goods specified was possible ; and notwithstanding there was nothing to indicate a change of intent in the case of the sixteenth class, nevertheless the words, " Nor for goods of any description which are above the value of $100 per package," were in this case to be read as if written, " Nor to an amount exceeding $100 per package for goods of any description."

Ninth. That from the decree of the said District Court your petitioner appealed to the Unites States Circuit Court of Appeals for the Second Circuit, and thereafter such proceedings were had upon such appeal that on the 30th day of July last past said Court rendered its decision affirming the decree of the said District Court, two of the Judges of said Court concurring in an opinion in favor of affirming the said decree of the said District Court and the remaining Judge filing a dissenting opinion in favor of reversing said decree and directing a decree in favor of your petitioner for the full value of the goods so shipped by him, as aforesaid, which said opinions are as follows :

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
Respondent-Appellee.

This is an appeal from a decree of the District Court, Southern District of New York, in favor of the libellant for $2,900 with interest and costs, the appellant contending that the decree erroneously limited his recovery.

LACOMBE, Circuit Judge :

Libellant shipped twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the Collector of Customs, for which respondent issued its bill of lading. The goods were not landed at Savanilla, but were brought back to New York and reshipped on the "Alvo" of the same line, which was lost at sea on the voyage with all on board. The actual value of the goods lost was $5,413.18.

Inasmuch as the respondent has not appealed, the only question before this Court is whether the District Court erred in limiting the amount of libellant's recovery to $100 per package under the bill of lading.

The bill contained on its face the following provision :

"And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consingee or holder."

On the back of the bill of lading, among numerous other clauses, was printed the following :

"1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made."

Stipulations in bills of lading, limiting the amount of the carrier's liability on each package carried to some stated sum, unless the value of the package is declared and a special agreement made have been repeatedly held valid, and such reasonable regulations for the conduct of the carrier's business so as to prevent imposition upon him and to establish proper charges adequate to the extent of the risks to be undertaken may be communicated to the shipper by notice printed upon the carrier's receipt (Hart vs. Pennsylvania R. R., 112 U. S., 331; Railroad Co. vs. Fraloff, 100 U. S., 24; Potter vs. The Majestic, 60 Fed. Rep., 624). It is contended that the clause above quoted is not such as these authorities sanction, namely, a reasonable regulation to protect the carrier from excessive loss, where the hazardous character of the goods or the fact that they are valuable is not disclosed to him, but is rather a clause undertaking to relieve the carrier entirely from his common law liability and therefore not enforceable. The language used, "shall not be liable for gold * * * or for goods of any description which are above the value of $100 per package, unless," &c., if literally construed would, no doubt, import that the carrier shall be liable for nothing in the package if its value is over $100. But a more reasonable interpretation is that adopted by the District Judge, namely, that the goods which are above the $100 in the package may be excluded from consideration and only those which amount to $100 be regarded. Being a clause in a written form of contract prepared by the carrier, and susceptible of two constructions, it is to be construed in favor of the other party, and as thus construed it applies only to such of the goods in each paceage as are in excess of the stipulated value, and is therefore within the authorities above cited.

The decree of the District Court is affirmed with costs of this Court to the appellee.

U. S. COURT OF APPEALS,

SECOND CIRCUIT.

CALDERON,
Appellant,
vs.
THE ATLAS STEAMSHIP CO., LIM.,
Appellee.

WALLACE, Circuit Judge:

I dissent from the judgment of the Court in this case. The twenty-six bales of goods in controversy were shipped by the libellant at New York for transportation to and delivery at Savanilla. The goods were not delivered by the steamship but were forgotten and overlooked by those in charge of her while she was being unloaded at Savanilla. After she had left the port the goods were discovered and were taken back by the steamship to New York and thence reshipped to their original destination on board another vessel, which foundered at sea and the goods were lost. The corporation owning the steamship attempts to escape liability for the loss of the goods by a defense founded upon a condition in the bill of lading which reads as follows:

"In case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

The bill of lading contained also another condition, which reads as follows:

"This agreement is made with reference to and subject to the provisions of the U. S. Carriers' Act, passed February 13, 1893."

By that act, commonly known as the Harter Act (27 U. S. Statutes at Large, 445), it is provided among other things that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause or agreement whereby the vessel shall be re-

lieved "from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of any merchandise committed to its charge, and that any words of such import inserted in the bill of lading "shall be null and void and of no effect." The Court below correctly decided that the condition relied upon was in direct contravention of the statute which the parties by express agreement had incorporated into the bill of lading, and therefore ineffectual to absolve the steamship company from liability for the failure, through negligence, to make proper delivery of the goods. But the Court also decided that the steamship company was entitled to a partial exemption from liability because of another condition in the bill of lading, which reads as follows:

"It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

In the opinion it was conceded that the condition, if read literally so as to exempt the carrier wholly for goods in packages exceeding in value $100, would be too unreasonable to be sustained; but the Court concluded that it should be construed as intended to exclude liability beyond $100 for goods in any one package, and, as so construed, was a reasonable one, and therefore valid.

This Court, in the prevailing opinion, has adopted the conclusions of the Court below. The construction thus given to the condition, seems to me, ignores its explicit terms, expressed in the plainest possible language. I think the condition was intended to exempt the carrier wholly in case of loss or damage to any goods of the several kinds mentioned in it, including those the value of which would exceed $100 per package. To uphold such a condition would permit a carrier, receiving goods which he may know are worth more than $100 per package, to absolve himself from all responsibility in respect to them, and thus divest himself altogether of the obligations which are inseparable from his occupation.

But if the condition is capable of being read so as to exempt the carrier from liability beyond the amount of $100 for each package, it does not include a liability for a negligent loss of the goods. In construing in a bill of lading the exceptions to the carrier's liability the rule obtains both in the English courts and our own that where the

words leave the intention in doubt they are to be construed against him, and their meaning is not to be extended to give him a protection for which he has not bargained in clear terms; and it is therefore to be presumed, unless the contrary is stated, that he is to continue liable for negligent acts and faults committed by himself or his servants. General words exempting him from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the Act of Congress. In order to give it any effect it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; and the cases of Hart vs. Pennsylvania R. R. (112 U. S., 331); Muser vs. Holland (17 Blatch., 412); Grooves vs. R. R. Co. (137 Mass., 33) and several others which might be cited where the contract was of that description, are not in point.

In Hart vs. Pennsylvania R. R., the Court say: "The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." And in concluding the opinion the Court used the following language: "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

There is no injustice in restricting a shipper's claim for damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried the parties are bound to that value in case of loss [M'Cance vs. L. & N. W. R. Co. (34 L. J., Ex. 39)]. Where there is an agreed valuation stated in the contract,

that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability, the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered after the steamship company had received the goods, and as delivered it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of $100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption therefore does not reach a loss by the carrier's negligence. This was distinctly adjudged in Magnin vs. Dinsmore (56 N. Y., 168) and Westcott vs. Fargo (61 N. Y., 542), and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary, in Belger vs. Dinsmore (51 N. Y., 156), where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same Court held the carrier's liability to be limited to that sum in the absence of the statement, although the loss was by his own negligence.

The authorities are elaborately considered and reviewed in Louisville R. R. Co. vs. Wynn (88 Tenn., 320), and the conclusion reached that a condition limiting the liability of a carrier, in case of loss, to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

The steamship company could have exacted from the libellant a statement of the value of his goods, if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value; but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence.

For these reasons I think there should be a reversal of the

decree below, and a decree for the libellant for the whole value of his goods.

TENTH. A certified copy of the entire record of the said cause in the said Circuit Court of Appeals is herewith furnished, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals.

ELEVENTH. That it is of serious importance to all persons shipping goods for transportation on the high seas, especially where, as in the case of shipments to the United States of Colombia and other places in South America, shippers are practically restricted to a single transportation line, that it should be definitively settled whether they are bound by any stipulations and conditions inserted by the carrier in, or printed upon the backs of, bills of lading merely by their receipt thereof when their attention is not called nor their assent asked to the same; and whether by such a stipulation or condition in the absence of express assent or agrement thereto by the shipper a carrier may lawfully limit the extent of his liability in case of loss or damage, the result of his own negligence or wrongdoing, or that of his officers and agents.

TWELFTH. That no mandate has issued from the said Circuit Court of Appeals to the said District Court in said cause, and no order therefor has been entered.

THIRTEENTH. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination, and in conformity with the provisions of Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said cause being made final in the said Circuit Court of Appeals by the said act.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to

this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Climaco Calderon, Libellant-Appellant, vs. The Atlas Steamship Company (Limited), Respondent-Appellee," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said decision of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

CLIMACO CALDERON.

J. LANGDON WARD,
Of Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, ss.:

CLIMACO CALDERON, being duly sworn, says: I am the petitioner above named; I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my knowledge, information and belief.

CLIMACO CALDERON.

Sworn to and subscribed before me this nineteenth day of November, 1895.

HENRY P. BUTLER,
[L. S.] U. S. Commissioner for the Southern Dist. of N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

To Messrs. Wheeler & Cortis,
Proctors for the Atlas Steamship Company, Limited:

Gentlemen—You will to please take notice that on Monday, the 9th day of December, 1895, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Yours, &c.,
J. Langdon Ward,
Proctor for Climaco Calderon and of Counsel.

Service of a copy of the foregoing notice and of the petition for writ of *certiorari* this, 22d day of November, 1895, is hereby admitted.

Wheeler & Cortis,
Proctors for The Atlas Steamship Company (Limited).

Supreme Court of the United States.

CLIMACO CALDERON

against

THE ATLAS STEAMSHIP COMPANY (Limited).

To the Supreme Court of the United States:

The answer of the Atlas Steamship Company, Limited, to the petition of Climaco Calderon for a writ of *certiorari*, respectfully shows to this Court:

First.—This respondent and appellee admits that the clauses specified in said petition are to be found in the bill of lading mentioned in said petition, but for greater certainty respecting the terms thereof it craves leave to refer to a copy of the same, which is annexed to the libel, and is contained in the certified copy of the record in the Circuit Court of Appeals in this case, which has been filed in this Court.

Second.—This respondent denies the allegations of the eighth article of the petition as to the decision of the District Court of the United States for the Southern District of New York. Respondent maintained, and through its counsel argued, in said Court that the evidence in this case showed that the petitioner had assented to the provisions and conditions printed on the back of said bill of lading, which were referred to on the

face thereof, and by the language on its face incorporated therein. It was also maintained and argued in said District Court that under the language of the ninth clause of the bill of lading referred to in the third article of the said petition, respondent had successfully maintained its defence, because it had shown reasonable diligence in looking for the goods in question at the port of Savanilla, which was one of numerous ports at which the steamships of this respondent touched, and had also shown that it was well known to the libellant that the steamships of respondent formed part of a regular line for transportation of mails and passengers, as well as freight, and touching at various ports in the West Indies and South America, and that it was impracticable always to deliver goods at the first port of delivery without waiting there so long as to interfere with the regular times of sailing from other ports, and that to meet these exigencies of the transit, this particular clause and other clauses had been introduced in said bill of lading. On this point the decision in the District Court was adverse to the respondent. The same point was argued in the Circuit Court of Appeals, and was not disposed of by that Court. On the argument of the appeal in said Circuit Court of Appeals this respondent also referred to the numerous cases in this Court, and in other federal Courts, sustaining the validity of limitations as to the amount of the recovery, and particularly the case of Hart *vs.* Pennsylvania R. R , reported in 112 U. S. Rep., 331 ; and Railroad Co. *vs.* Fraloff, 100 U. S., 24. It was also argued that all contention as to whether or not the libellant had accepted the bill of lading or was bound by the clauses therein, was precluded by the admission in the libel that the libellant received for the goods transported "three bills of lading, receipts and contracts, all of like tenor and date," wherefore a copy was annexed to said libel.

Third.—Ever since the decision of this Court in the case of York Co. *vs.* Central R. Co., 3 Wall., 107, it has been, as this respondent is advised by its counsel, and verily believes, well settled that shippers are bound by the terms of bills of lading delivered to them, whether they examine such terms or not. In point of fact bills of lading as issued by this respondent, and over regular transportation lines, are well known commercial documents, the terms and stipulations of which have been the subject of conference on many occasions between various commercial bodies, such as the Chambers of Commerce in various ports, including the port of New York, representing the shippers of cargo; and committees from the various lines of common carriers, and the general character and nature of such terms and stipulations is well understood by shippers as well as carriers.

Fourth.—This respondent is advised and believes that said judgment of the said U. S. Circuit Court of Appeals is not erroneous, and that under the decisions of this Court the case does not present questions which should be certified to this Court for its review and determination.

WHEREFORE, this respondent respectfully prays that the prayer of the petition may be denied, and that said petition may be dismissed.

THE ATLAS STEAMSHIP
COMPANY (Limited),
by
H. G. KELLOCK,
Agent.

EVERETT P. WHEELER,
Proctor and Advocate
for the Respondent.

Southern District of New York, ss.:

HENRY GREY KELLOCK, being duly sworn, deposes and says: That he is the duly authorized attorney in fact, in the city of New York, of the respondent in the above-entitled action, and that the foregoing answer is true, to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

H. G. KELLOCK.

Subscribed and sworn to, this 9th day of December, 1895, before me.

CHAS. S. HAIGHT,
Notary Public,
Kings Co.,

[SEAL.]

Certif. filed in N. Y. Co.